

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

In the Matter of )  
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Amendment of Part 1 of the ) WT Docket No. 97-82  
Commission's Rules -- )  
Competitive Bidding Proceeding )

**COMMENTS OF OMNIPOINT CORPORATION**

Omnipoint Corporation ("Omnipoint"), by its attorneys, files these comments in response to the June 2, 1997 Public Notice released by the Wireless Telecommunications Bureau.<sup>1</sup> In a number of ways, Omnipoint has a significant stake in the outcome of this proceeding. It is the holder of 18 C Block licenses, 43 F Block licenses, and has pending 7 F Block license applications for which it currently faces an aggregate \$517.6 million in future installment payments. To date, Omnipoint has paid \$73.7 million to Commission in deposits and interest payments for these Entrepreneur Band licenses. It was also the losing bidder on many Entrepreneur Band licenses. Omnipoint shares the legitimate and prevailing concern over recent market conditions that have made it quite difficult for some small business licensees to obtain adequate financing at this time.

In Omnipoint's view, any Entrepreneur's Band debt restructuring requires a nondiscriminatory and balanced approach by the Commission to address what are *temporary* financial market conditions that caused the current problems. If the Commission adopts any *permanent* restructuring of the Entrepreneur's Band auction debt at this time, before even the first

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<sup>1</sup> "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," Public Notice, WT Dkt. No. 97-82, DA 97-679 (rel. June 2, 1997) ("Public Notice").

interest payments are made (let alone the first installment payment of principal), it will face significant legal challenges. Under the circumstances, *temporary* nondiscriminatory solutions for *temporary* problems seem reasonable and prudent to facilitate small business participation in PCS.

Omnipoint believes that, for now, the Commission should temporarily change from quarterly to annual installment payments for all Entrepreneur Band licensees. Omnipoint believes that annualizing the installment payments, tied to resolution of the temporary but industry-wide problem, is the best way for the Commission to avoid time-consuming and legitimate legal challenges that surely will follow any permanent debt restructuring so early in the license term. This solution has four advantages.

First, it would offer licensees immediate relief from their current financial difficulties, but permit the Commission to maintain its emphasis on market-based solutions. As the market for wireless financial securities continues to rebound, as it has for the past 60 days, more licensees would be able to obtain initial financing and return to the quarterly installment payment schedule as early as next year.

Second, a temporarily annualized payment schedule that defers the next payment for all Entrepreneur Band licensees until March 31, 1998 allows all Entrepreneurs time to pursue financing after the January, 1998 implementation of the WTO Agreement. Thus, all Entrepreneur Band licensees would have the opportunity to seek foreign capital from WTO countries prior to their next auction payment.

Third, the Commission can implement a decision to temporarily change from quarterly to annual payments without changing any of the auction rules and without upsetting any bidders' legitimate reliance interests.<sup>2</sup> All in the PCS industry agree that it is not a legitimate public interest goal for the Commission to intervene to compensate for irresponsible overbidding or to make certain operators financially viable. As the Commission has said in a number of contexts, its

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<sup>2</sup> See, note 6, *infra*.

paramount role as regulator is to protect competition, not individual competitors. Permanent restructuring of auction debt at a time so close to the issuance of licenses, and before the first installment payments are made, would undermine the public good of auctions as an efficient license *allocation* mechanism.

Fourth, the Commission can revisit each year the decision to annualize installment payments. Thus, it is an incremental approach, rather than a structural change that could distort the entire industry dynamics. As discussed below, a permanent restructuring of debt at this time would be especially disruptive to the PCS industry as a whole because so much of the aggregate C Block debt is so closely tied to large resellers.

Finally, the Commission must be nondiscriminatory, and apply the installment plan relief across all licenses with installment payments. To date, the C Block installment payment plan has not measured up to that goal. For example, while all licenses were allocated to small businesses in a single auction, one set of C Block licensees has been assessed an interest rate that is ½ % higher than another set of licensees.<sup>3</sup> If not corrected, this will result in tens of millions of dollars of overpayment by some bidders. In addition, the same licensees that are strapped with the higher interest rate were already required to make their first payment under the installment plan, while the licensees with the lower interest rate have yet to make even one interest payment. The Commission should immediately rectify these highly arbitrary regulatory disadvantages.

## **DISCUSSION**

### **I. Any Entrepreneur's Band Debt Restructuring Must Balance The Need for Relief With The Preservation of Fairness and Integrity in the Auction Process**

If the Commission restructures Entrepreneur's Band installment payment plans, it must strike an appropriate balance based on clear and articulated policy objectives. Under the

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<sup>3</sup> See Omnipoint Corporation, Request for Rule Waiver (filed Dec. 16, 1996); FCC Public Notice, DA-1152 (rel. June 2, 1996).

circumstances faced by C Block small businesses, some temporary relief for all affected licensees may be appropriate if it does not alter the fundamental purpose of the auction as a license allocation mechanism or artificially distort the industry dynamics through implicit subsidies. Post-auction relief at this time should not itself undercut the fundamental risks governing all auction behavior and pricing. Auctions are an *allocation* mechanism among competing applicants. If the Commission permits winning bidders to shed the economic costs of their bids almost immediately after the auction is over, the efficiency and fairness of the allocation mechanism is lost. Therefore, the inherent tension in restructuring the Entrepreneur's Band installment payment plan requires the Commission to discern the public interest in providing relief that is consistent with the auction methodology. Reasonable relief should go no further than necessary to meet those articulated policy objectives. Given the complex legal situation, the changing financial and regulatory environment, and the competitive impact that Entrepreneur's Band restructuring would have on other competing broadband PCS providers, the Commission should implement an initial plan for temporary relief.

Each party advocating the various restructuring plans cites the unanticipated financial market down-turn as the basis for a change to the installment payment plan. But, market slumps can quickly turn around. For example, InterCel was forced to pull its \$300 million high-yield debt offering in March of this year, but three months later it was oversubscribed when it completed the same financing at a coupon rate of only 11 1/8% on June 10, 1997, just 13 days ago.<sup>4</sup> This interest rate is lower than the rate at which Omnipoint obtained high-yield debt last August when market conditions were presumed to be favorable for wireless companies. InterCel's recent success is even more noteworthy because the stated intent of the proceeds is for build-out of the Atlanta market, for which InterCel paid \$28/pop *present value*.<sup>5</sup> This price per pop is higher than what many C Block

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<sup>4</sup> See "InterCel, Inc. Completes \$300 Million," Blumberg News Service (June 10, 1997).

<sup>5</sup> "InterCel Buys Atlanta MTA," Blumberg News Service (March 13, 1996).

players claim is the present value of their C Block bids. Thus, some PCS business plans can be financed in today's market.

Changing the installment payments from quarterly to annual provides Entrepreneur Block licensees a needed respite to focus financial resources on build-out and to garner additional financial backing. It is also inoffensive to the policy goals of the Commission's auction scheme. A change from quarterly to annual payments involves no change to the Commission's rules.<sup>6</sup> It is fair to all auction participants, even those that obtained no licenses, because bidders could not have legitimately relied on the expectation of quarterly, as opposed to annual, installment payments.<sup>7</sup> A change to annual payments does not involve any change in the interest or principal payments owed to the federal government. Temporary annualization of the installment payments involves none of the litigation risks of, and is completely different from, proposals to permanently eradicate interest payments for several years, to further skew principal payments to the later years, or to extend the total payment term out to 15 or 20 years, which even exceeds the term of the license. Cf., 47 C.F.R. § 1.2110(e)(3)(i)-(ii) (installment plan shall be for "full license term," with interest at rate of government debt instrument "closest to the duration of the license term.").

Omnipoint respectfully submits that the Commission should be guided by the following principles as it considers restructuring proposals:

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<sup>6</sup> Both Section 1.2110(e)(3) and Section 24.711(b) of the Commission's rules contemplate installment payments over the full term of the license, with interest and/or principal payments owed annually; the rules do not specify that quarterly payments must be used to satisfy the annual interest and/or principal obligations. 47 C.F.R. §§ 1.2110(e)(3), 24.711(b).

<sup>7</sup> Unlike annual installment payments, restructuring that includes a five-year interest free period is a major change in the terms of the C Block installment plan. A five-year interest free period is not contemplated by the Commission's rules, which prescribe annual interest payments at least annually from all Entrepreneur Band licensees. 47 C.F.R. §§ 1.2110(e), 24.711.

1. *Temporary Changes in Market Conditions May Warrant Temporary Accruals of Installment Payments, But Do Not Justify Permanent Changes to the Installment Plan*

As market conditions improve, the participants will be able to return to the installment payment plan they agreed to as a condition of acceptance of their licenses. This goal should be key to any post-auction changes to the payment rules implemented at this time. Temporary relief is the most any commercial lender would offer.<sup>8</sup> Just as the duration of the loan would never exceed the duration of the asset in a commercial lending context, so too should the relief provided here extend for no longer than the duration of the temporary financial market conditions. Since no one can predict when the market will turn around fully, the Commission should employ an incremental approach in fashioning its relief. A reasonable commercial lender's response to the C Block debt situation would be a temporary accrual from quarterly to annual payments.

2. *Fairness to All Participants, Including Losing Bidders*

Nearly every C Block license was won by only one minimum bid increment. Thus, for each of the 493 licenses at auction, there exists at least one bidder that was willing to pay 5% less than what the winning bidder asserted it would pay. Consequently, any permanent restructuring so early in the ten-year payment term that reduces the net present value of the winning bidder's obligation by 5% or more will be highly vulnerable to litigation on the obvious fairness and reliance grounds, as well as arbitrariness. The situation may be different if bidders had already made several years of payments and then some permanent market change took place. Today, however, the licenses have just been issued and some business plans are obtaining financing while others are not. Thus, only a temporary change from quarterly to annual payments can be implemented fairly and reasonably at this time without altering the auction rules. See, n. 6, supra.

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<sup>8</sup> In fact, a commercial lender might also assess late penalties in addition to accruals or fees to compensate for the handling of the payment changes; Omnipoint does not recommend such actions under the current circumstances.

3. *The Resale Problem: Ensuring That Restructuring License Debt Does Not Result in a Subsidy to Resellers*

At least half of all the C Block auction debt is tied directly or indirectly to recently signed arrangements with large resellers. At a PCS industry level, this is perhaps the most troubling problem associated with restructuring of the C Block debt. Some of these resale arrangements were controversial to start with, and much has been made in the press of the tens of billions of minutes that have already been "sold" to resellers by certain C Block players. If the Commission now waives the cash interest payments of these parties for any extended period of time, the result would be a significant and artificial subsidy for large resellers.

Even before the proposals for C Block debt restructuring, the C Block/resale controversy centered on two issues. First, the transfer prices negotiated in some of the resale arrangements are significantly below the market rates available to resellers from any of the other five existing wireless licensees in each major city. Second, in some cases, the C Block licensee adds no value to the operation aside from the spectrum; the resellers provide all the customer's services, marketing, brand name, etc. In these relationships, the C Block licensee's function is to arrange financing for the license and for cell site construction. In effect, the reseller obtains off balance-sheet financing for the capital-intensive portions of the wireless operations (i.e., infrastructure and license payments). In a competitive market, such business arrangements may be inoffensive; however, a significant problem arises should the Commission restructure the license debt underpinning those resale arrangements.

If the Commission were to permanently restructure the debt so that the reselling licensee need not make any payments for an extended period of time, then an artificial subsidy flows to the large reseller compared to other PCS competitors in the market. If the no-payment period is long enough, the reseller has every incentive to engage in predatory pricing to eliminate competition and maximize market share before the license payments become due.

Like a commercial lender offering temporary relief, the Commission might be able to mitigate the subsidy problem by requiring, as a condition of the debt restructuring, that the resellers make reserve payments which would be applied directly toward the original quarterly installment payment schedule.

4. *Any Permanent C Block Restructuring So Early in the Term of the Debt Will Impact the Meaning of Bids in Future Auctions*

Any permanent restructuring of C Block debt so early in the term of the debt creates a precedential dilemma -- how do bidders in future auctions know when to stop bidding? For example, the bidder in a future auction can legitimately question whether its bid or that of an auction competitor will ever be paid under the terms in place at the time of the auction. The bid prices at auction would simply mean that the first deposit is an option on the size of the anticipated post-auction restructuring that can be obtained from the Commission.

If the Commission permanently restructures the payments before the first installment payment is even paid, it establishes a precedent that future bidders may never have to pay what they bid. This issue arises not only in the context of an installment payment program, but applies to all auctions because a significant period of time (including the review of license applications) passes between the initial down payment made at the close of an auction and the final principal payment made as a condition of the license grant, several months later.

It would be tragic to burden the auction methodology, which has performed so well to date, with such a systemic problem. Rather, the PCS industry and the Commission must face the fact that some C Block licensees will fail under any conceivable restructuring. Those licensees will go into default, the Commission will re-auction those licenses, and the new licensees, for legal and practical reasons, will presumably have the option of an installment plan like other C Block licensees. However, a permanent restructuring at this time would raise the spectre that bidders in future C Block re-auctions cannot even estimate whether the payment rules will be enforced. Bidders will always have an incentive to presume that they can bid with the knowledge of a post-auction restructure to reduce the real auction price. A temporary relief plan, however, that changes



payments from quarterly to annual for a brief period should significantly minimize the negative implications for future auctions.

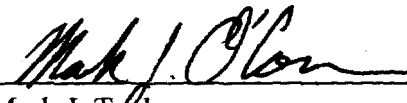
### **CONCLUSION**

The Commission should remain silent at this time on proposals to permanently restructure the Entrepreneur's Band installment payment plan. Omnipoint favors temporary relief that is designed to address the recent conditions in the financial markets and that does not undermine the policies underpinning the auction process. The Commission can review this decision in one year, and avoid the otherwise serious litigation that will arise from permanent restructuring of debt so early in the ten-year term of payment.

Respectfully submitted,

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